THE INCOME TAX IN THE AMERICAN COLONIES AND STATES.

THE recent discussion as to the constitutionality of the income tax has aroused some interest in the query whether the taxation of incomes is, after all, such a novel thing in American experience. While we have all heard much about the federal income tax of the Civil War period, we look in vain for any account of earlier instances. It may be well, then, to put on record the facts of income taxation in the American colonies, to compare the colonial taxes with analogous taxes in the American commonwealths of the present century, and to ascertain, if possible, how far these imposts really deserve the name of income taxes.[1]

I. *The Beginnings.*

The first general tax law in the American colonies, with the exception of the early poll-tax in Virginia,[2] was the law of 1634 in Massachusetts Bay.[3] This provided for the assessment of each man "according to his estate and with consideration of all other his abilityes whatsoever." It is probable that the measure of this ability was to be found in property; for, although the law itself does not further explain the term, the matter is elucidated in a provision of the next year, that "all men shall

[1] This essay was originally written, with the exception of a few paragraphs, about two years ago, and was intended to form a chapter in a general work on the income tax. At the request of Mr. Clarence A. Seward, one of the counsel in the recent income-tax cases before the United States Supreme Court, a portion of this essay was submitted to him in manuscript form, and was utilized with my consent in the preparation of the monograph submitted by him in the original hearing as a supplementary brief. The majority of the quotations in that monograph (pp. 22–28) are taken from the manuscript essay.

[2] For the early Virginian legislation, see Ripley, Financial History of Virginia, 17–24 (Columbia College Studies in History, Economics and Public Law, vol. iv, no. 1).

[3] Colonial Records of Massachusetts Bay (Shurtleff's ed., 1853), I, 120.

be rated for their whole abilitie, wheresoever it lies."[1] This seems to imply only visible property; for such property alone is susceptible of a *situs*.

It was not until several years later that "ability" was defined to include something more than mere property. This, however, occurred not in Massachusetts Bay, but in the colony of New Plymouth. In 1643 assessors were appointed to rate all the inhabitants of that colony "according to their estates or faculties, that is, according to goods lands improoued faculties and ꝑsonall abillities."[2] This law is noteworthy for a double reason. It is the first to use the term faculty, and it distinguishes faculty and personal ability from visible property. But although it provides for a faculty tax, it does not tell us exactly how to measure this faculty. This was reserved for the more comprehensive law enacted three years later by the Court of Assistants of the Massachusetts Bay Company. The court order of 1646 provides not only for the assessment of personal and real estates, but distinctly mentions "laborers, artificers and handicraftsmen" as subject to taxation, and then goes on to say:

> And for all such persons as by advantage of their arts and trades are more enabled to help bear the public charges than the common laborers and workmen, as butchers, bakers, brewers, victuallers, smiths, carpenters, taylors, shoemakers, joyners, barbers, millers and masons, with all other manual persons and artists, such are to be rated for returns and gains, proportionable unto other men for the produce of their estates.[3]

Here for the first time we have the definition of faculty or ability. Just as the faculty of the property owner is seen in the produce of his estate, so that of "artists" and "tradesmen" is to be found in their "returns and gains." Of course, since the property value of an estate is approximately equal to the capitalized value of the annual produce, the faculty of the

[1] Colonial Records of Massachusetts Bay, I, 166.

[2] Records of the Colony of New Plymouth: Laws 1623–1682 (Pulsifer's ed.), XI, 42.

[3] Colonial Records of Massachusetts Bay, II, 173. *Cf.* II, 213, and III, 88.

property owner can be measured by the value of the property, that is, by the value of his "estate"; but when there is no property, the assessors are compelled to fall back on the "returns and gains."

The principle thus laid down in the records of Massachusetts Bay was soon adopted by other colonies. The colony of New Haven, for instance, at first levied a land tax. But as early as 1640 personal property was assessed, by the provision that a new rate should be "estreeted, halfe upon estates, halfe upon lands."[1] In 1645 it was seen that even this was not adequate, and a proposal was made to tax others besides property owners; but no decision was reached at that time.[2] As the dissatisfaction grew, a committee was appointed in 1648 to inquire into the feasibility of the Massachusetts system of taxing all property in general, and also of levying a tax on the profits of those who possessed no property.[3] The committee reported that they were in doubt as to the advisability of taxing houses and personal property, but that "for tradesmen they thinke something should be done that may be equall in waye of rateing them for their trades." As a result the law of 1649 was enacted, which introduced the taxation of profits of laborers, tradespeople and others.[4]

[1] Records of the Colony and Plantation of New Haven, I, 40.

[2] The court considered "how heavy the publique chardges grew, that most of them have bin expended for the publique safty and about things of common public vse, wherein all that live in the plantation have a like benefit in their proportions, and yet many live in the plantation and have manny priveledges in it have hitherto borne noe part of these publicque chardges, wherevppon it was debated whether or noe in equety such should not be rated some way or other for time to come, so as those that have borne the whole burden hitherto may be eased; but because it was not ripe for an issue, the court referred to . . . a committee." Records of the Colony and Plantation of New Haven, I, 181.

[3] Lieut. Seely propounded that the court would "consider of some other waye of rateing men than is settled by lands for divers men wch had good estates at first and land answerable, whose estates are sunke and they not able to paye as they did, and divers psons whoe had land for their heads, whose estates are smalle, yett paye great rates, and others whose estates are increased, haveing but little land, paye but a small matter to publique charges," *etc., etc.* Records of the Colony and Plantation of New Haven, I, 448.

[4] The reason given was: "Seeing that labourers and handycrafe trades & seamen are of divers sorts & conditions, some live more comfortably, some less, some follow ther trades more and some less, ther time being taken vp more aboute

In Connecticut the early laws were patterned on the Massachusetts Bay legislation. It was provided in 1650 that "every inhabitant who doth not voluntarily contribute proportionably to his abillity to all common charges shall be compelled thereunto by assessments and distress"; and it was further provided that the lands and estates should be rated "where the lands & estates shall lye," but "theire persons where they dwell."[1] Then follow detailed instructions how to assess various kinds of property. The final clauses in these instructions provide for the faculty tax on all "manuall persons and artists," *etc.*, following word for word the Massachusetts Bay law of 1646, as quoted above. These provisions are frequently repeated in the laws of the seventeenth century.

In Plymouth Colony the practice inaugurated by the law of 1643 continued, although we find only two more instances where it is expressly mentioned, namely, in 1665, when "visible estates and faculties" are spoken of,[2] and in 1689, when a court order fixed the valuation for different kinds of visible estate, but left the valuation of "faculties and personall abilities" to be determined "at will and doome."[3]

In Rhode Island the faculty tax was introduced a little later. In 1673 the assembly laid down the rule that taxes ought to be assessed according to "equety in estate and strength," *i.e.*, not only according to the property, but also in proportion to what was elsewhere called the "faculty," or "profits and gains."[4]

husbandry wch payes another way, that therefor a due consideration be had, and every man justly rated as neere as the comittee can judge, and that other men whoe trade in way of merchandizing bee duely rated according to their trades and stockes they improve, as neere as they can judge." *Ibid.*, I, 494.

[1] Colonial Records of Connecticut, I, 548.

[2] Records of the Colony of New Plymouth (Pulsifer's ed.), XI, 211; Shurtleff's ed., IV, 102.

[3] Records of the Colony of New Plymouth, VI, 221.

[4] "This assembly, taking into consideration the great dissatisfaction and irregularity that hath been by makeinge rates or raisinge a common stock for public charges in this Collony in general or for any perticular towne, and the great faileableness to accomplish it and great delaies in performance, what was done, and the necessity there is for publick charge to be borne, and the justice it should be done according to equety in estate and strength," *etc.*, *etc.* Colonial Records of Rhode Island, II, 510.

In Rhode Island we find moreover the curious survival of the mediæval practice that every man should assess his neighbor as well as himself.[1] Later on "three able and honest men" were chosen in each town to "take the view of each of their inhabitants," and as to "the merchants and tradesmen to make this part of the rate according to the yearly profit."[2]

Outside of New England this early taxation of profits by the side of the general property tax is found also in New Jersey, where it was provided by the law of 1684 that not only property owners, but also

> all other persons within this province who are free men and are artificers or follow any trade or merchandizing, and also all innholders, ordinary keepers and other persons in places of profit within this province, shall be lyable to be assessed for the same according to the discretion of the assessors.[3]

This completes the list of examples of the faculty tax during the seventeenth century. Later on, as we shall see, the tax appeared in some of the Southern states. In New York it never secured a foothold. During the Dutch domination the tax system of this latter colony was composed almost entirely of excises and duties; when the English obtained control, the general property tax was introduced, but without any additional "faculty" tax as in the New England colonies.[4]

[1] The individual shall be required to "give in writeinge what proportion of estate and strength in pertickelar he guesseth tenn of his neighbours, nameinge them in pertickular, hath in estate and strength to his estate and strength." *Ibid.*, II, 512.

[2] *Ibid.*, III, 300 (1695).

[3] Laws of New Jersey, 1664–1701 (Leaming and Spicer), 494.

[4] Ely, in his Taxation in American States and Cities, 110, says that "the estimated incomes of certain classes were taxed." The context is not clear, but Professor Ely could only have meant that this was the case in New England, whose tax system is described in the New Netherland document to which allusion is made. Yet this passage was quoted in the brief submitted by Mr. Seward to the Supreme Court as showing that the system was to be found in New Netherland. This is a complete mistake. No such system ever existed in New Netherland. Mr. Seward's mistake is not wholly inexcusable, because it is not easy to ascertain from Dr. Ely's text whether he is referring to New England or to New Netherland.

II. *The Eighteenth Century.*

During the eighteenth century the custom of assessing profits continued and extended to other colonies. In Massachusetts more earnest and repeated efforts to explain and enforce the law were made than anywhere else. This will be our excuse for tracing the legislation in more detail.

Upon the union of the Plymouth and Massachusetts Bay colonies into the Province of Massachusetts, under the charter of 1692, a law was immediately enacted providing that all estates whatsoever, real and personal, should be taxed at "a quarter part of one year's value or income thereof." But this was not very clear. Nor was the doubt removed by another law of the same year, to the effect that "every handicraftsman" be valued "for his income."[1] In 1697, however, we find the old terms used as of general application. The assessors are now again cautioned to rate the taxpayers, "having due regard to persons' faculties and personal abilities." In 1698 the clause "not excluding faculties" is inserted. And in the following year the assessors are instructed to tax "incomes by any trade or faculty which any persons do or shall exercise."[2] A few years later fuller instructions are given. Thus in 1706, the assessors are admonished to rate

> income by any trade or faculty, which any person or persons (except as before excepted) do or shall exercise in gaining by money, or other estate not particularly otherwise assest, or commissions of profit in their improvement, according to their understanding and cunning, at one penny on the pound, and to abate or multiply the same, if need be, so as to make up the sum hereby set and ordered for such town or district to pay.[3]

The law of 1738 adds the words "business or employment," commanding the assessment of

> the income or profit which any person or persons (except as before excepted) do or shall receive from any trade, faculty, business or

[1] Acts and Resolves of the Province of Massachusetts Bay, 1692 to 1780 (5 vols.), I, 29, 92. [2] *Ibid.*, I, 302, 413. [3] *Ibid.*, I, 592.

employment whatsoever, and all profits which may or shall arise by money or other estate not particularly otherwise assessed, or commissions of profit in their improvement. . . .[1]

Except as to the rates, this form of law continued unchanged till 1777. The law enacted in this year gives a fuller interpretation of income than any hitherto. Taxpayers are assessed

on the amount of their income from any profession, faculty, handicraft, trade or employment; and also on the amount of all incomes and profits gained by trading by sea and on shore, and by means of advantages arising from the war and the necessities of the community.[2]

Again, the law of 1779 provides that,

in considering the incomes and profits last mentioned, the assessors are to have special regard to the way and manner in which the same have been made, as well as the quantum thereof, and to assess them at such rate, as they on their oaths shall judge to be just and reasonable; provided, they do not in any case assess such incomes and profits at more than five times [increased in the next year to "ten times"] the sum of the same amount in other kind of estate.[3]

In 1780, a constitution was adopted which commanded, among other things, that the public charges of government should be assessed "on polls and estates in the manner that has hitherto been practiced." The same methods, therefore, continued to the end of the century.

In none of the other colonies do we find so full or so frequent indications of the legislative intent as in Massachusetts. But occasional references are found to the practice of assessing income. And although it is probable that the custom was gradually dying out, the storm and stress of the Revolutionary period brought it again to the front in several places.

In Connecticut we have seen that the early laws followed almost word for word the Massachusetts legislation. Later acts provided that

[1] Acts and Resolves of the Province of Massachusetts Bay, 1692 to 1780 (5 vols.), II, 934. [2] *Ibid.*, V, 756. [3] *Ibid.*, V, 1110, 1163.

all such persons who by their acts and trades are advantaged shall be rated in the list . . . proportionable to their gains and returns, — butchers, bakers . . . and all other artists and tradesmen and shopkeepers.[1]

As the assessors might find it difficult to rate them justly, the law sometimes gave more explicit directions as to fixing the income. Thus the following was enacted in 1725: "For the future every one of the allowed attorneys at the law shall be set in the annual list for their faculty, *i.e.*, those that be the least practitioners fifty pounds, and the others in proportion to their practice."[2] It may be doubted whether even this settled the matter definitely.

Later enactments prove, however, that instead of directly estimating the profits of the taxpayers liable to the tax, the assessors used different criteria to compute the amount. For instance, it had several times been provided that "all traders, tradesmen and artificers shall be rated in the list proportionable to their gains and returns." But as there seems to have been no uniformity in the methods employed, the following important act[3] was passed in 1771:

All traders or shopkeepers in this Colony shall be rated in the list after the rate of ten *per cent* on the prime cost of all goods, wares, and merchandizes which they purchase for sale by retail (except the produce and manufactures of this Colony). And all traders by wholesale, tradesmen, artificers, tavern-keepers, and others by law rateable on account of their faculty or business, shall be rated in the list to the amount of their annual gains, incomes or clear profits by means of their business, according to the best estimate that can be made thereof by the listers, who shall assess such traders, tradesmen, &c. by their best discretion, agreeable to the rules aforesaid. But when it appears that any persons have been unsuccessful or sustained considerable losses in their trade, in such cases the listers may make proper abatement for the same. And if any person shall be assessed by the listers for any of the matters aforesaid more than at the rates aforesaid, upon proof thereof, by oath or otherwise, to the satisfac-

[1] Acts and Laws of Connecticut (New London, 1715), 100.
[2] Colonial Records of Connecticut, 1717–1725, VI, 525.
[3] *Ibid.*, 1768–1772, XIII, p. 513.

tion of the listers, or authority and selectmen, who have right by law to grant relief, such overcharge may be abated.

The faculty tax continued in Connecticut to the close of the century substantially unchanged, with the exception that ordinary artisans were subsequently exempted. Secretary Wolcott, in his famous report on direct taxes in 1796, described the tax system as embracing first, a tax on various kinds of property, real and personal, and second, "assessments proportioned to the estimated gains or profits arising from any and all lucrative professions, trades and occupations, excepting compensations to public officers, the profits of husbandry and common labor for hire." This second element was included in the annual lists of taxable property as "assessments on lawyers, shopkeepers, surgeons, physicians, merchants, *etc.*"[1]

In Rhode Island, where the faculty tax was originally levied as in the neighboring colonies, it seems to have fallen into disuse somewhat earlier. In 1744 the tax law still provides "that the assessors in all and every rate shall consider all persons who make profit by their faculties, and shall rate them accordingly."[2] This is the last direct mention of the faculty tax. In 1754 and 1755 the only taxes named are those on "estates and polls."[3] This expression might possibly still be considered to include faculties. But in the revision of 1766, which served as a basis of valuation during the remainder of the century, we search in vain for any mention of the faculty tax.[4] And when Wolcott drew up his report in 1796, he described the system of taxation simply as one "on polls and the collective mass of property."[5] It may safely be said, therefore, that the faculty tax had disappeared in Rhode Island by the middle of the century.

[1] American State Papers, Finance, I, 423, 454.

[2] Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations (Newport, 1745), 295.

[3] Records of the Colony of Rhode Island, V, 309, 465. A curious protest against the arbitrariness in the assessment of the general taxes is to be found in 1766. *Ibid.*, VI, 518.

[4] Acts and Laws of the English Colonies of Rhode Island and Providence Plantations, 219.

[5] American State Papers, Finance, I, 422.

In New Hampshire the faculty tax came late into use. The first detailed assessment law passed in the province, in 1719, instructed the selectmen to assess the residents "in just and equal proportion, each particular person according to his known ability and estate." Later on, in 1739, "an act for the more easy and speedy assessing" of taxes was passed, which authorized the selectmen to assess "the polls and estates of the inhabitants, each one according to his known ability."[1] In 1772 greater definiteness was attained by the provision that a person's "faculty" should be estimated at the discretion of the assessor, although not at a sum over twenty pounds.[2] Before the close of the century, however, the tax had disappeared. For the law of 1794, which fixed all the details of the state's system, while taxing tradesmen, storekeepers and others, assessed them merely on their stock in trade as a part of their personal property.[3]

In New York, as we know, there never was any faculty tax. But Vermont, when it split off from New York, followed the example of Connecticut in taxation as in much other legislation. The first law on the subject, that of 1778, is very explicit in its provisions, and repeats the Connecticut law in some places word for word.[4] The part of interest to us is as follows:

Be it further enacted by the authority aforesaid, that all allowed attorneys at law in this commonwealth, shall be set in the annual list for their faculty, — the least practitioner fifty pounds, and the others in proportion according to their practice; to be assessed at the discretion of the listers of the respective towns where said attorneys live during their practice as such. All tradesmen, traders, artificers, shall be rated in the lists proportionable to their gains and returns; in like manner, all warehouses, shops, workhouses and mills where the owners have particular improvement or advantage thereof, according to the best judgment and discretion of the listers.

[1] Acts and Laws of his Majesty's Province of New Hampshire (1761), 30, 180.

[2] Law of Jan. 2, 1772.

[3] Law of February 22, 1794; New Hampshire Laws of 1793, 472.

[4] An Act directing Listers in their Office and Duty. Printed in Laws of Vermont, 1779 (295 of Slade's State Papers). No copy of the laws of 1778 is known to be in existence. The laws of that year were embodied in the volume for 1779. See Wood, History of Taxation in Vermont, 32 and 36 (Columbia College Studies in History, Economics and Public Law, vol. iv, no. 3).

In 1791 attorneys also were assessed "proportionable to their gains according to the best judgment and discretion of the listers."[1] And in 1797 the general provision was inserted that "all licensed attorneys, practitioners of physic or surgery, merchants, traders, owners of mills, mechanics, and all other persons who gain their livelihood by buying, selling, or exchanging, or by other traffic not in the regular channel of mercantile life," be listed in proportion to their returns.[2]

Outside of New England, the faculty tax was to be found also in Pennsylvania, though not until after the Revolution had commenced. In 1782 a law was enacted which imposed a poll tax on all freemen. But the law went on to say that

> all offices and posts of profit, trades, occupations and professions (that of ministers of the gospel of all denominations and schoolmasters only excepted) shall be rated at the discretion of the township, ward or district assessors, and two assistant freeholders of the proper township, ward or district, having due regard to the profits arising from them.[3]

In 1785 mechanics and manufacturers were added to the list of exempted classes. The discretion which this act left to the assessors was very slight, as the lower and higher limits of the tax were definitely fixed. In distinction from the faculty tax proper, this might rather be termed a classified poll tax with a very low maximum. For instance, freemen of no profession or calling might be assessed from fifty cents to ten dollars; mechanics and tradesmen, thirty cents to two dollars; tavern-keepers, shop-keepers and other retailers, fifty cents to five dollars; brokers, bankers, merchants, lawyers and physicians, one to ten dollars; persons of professions or occupations not before described, twenty-five cents to eight dollars. These rates applied only when the tax on real property amounted to one per cent. When the rate fell below this, the "taxes on occupations and professions," as they were called, were to be proportionately reduced.[4]

[1] Laws of 1791, 266.

[2] Compilation of Laws of 1797, 565. See Wood, *op. cit.*, 39.

[3] Laws of the Commonwealth of Pennsylvania (Dallas), II, 8.

[4] American State Papers, Finance, I, 428.

In Delaware, also, we find the faculty tax. The law of 1752, indeed, simply provided that all persons should be assessed on their estates. But that this included more than mere visible property, is apparent from the section which states that single men who have no visible estates shall be assessed at not less than £12 nor more than £24, and that in all cases the assessors shall pay "due regard to such as are poor and have a charge of children."[1] When Wolcott described the system, he spoke of it as based on the assessment of profits. But in 1796, when a new law was passed, provision was made for "ascertaining the stock of merchants, tradesmen, mechanics and manufacturers, for the purpose of regulating assessments upon such persons, proportioned to their gains and profits."[2] In other words, stock in trade was now assessed as personal property.

Even in the more southern states the faculty tax was not unknown. In Maryland, during the colonial period, the tax system was very primitive; as its historian states, taxes were levied "by even and equal assessment, without reference to ability to pay, revenue enjoyed or property worth."[3] But when the state constitution was adopted in 1777, and the poll tax was abolished, not only was a property tax inaugurated, but provision was made for the faculty tax by imposing an assessment of one-quarter of one per cent on the "amount received yearly" by "every person having any public office of profit, or an annuity or stipend," and on the "clear yearly profit" of "every person practising law or physic, every hired clerk acting without commission, every factor, agent or manager trading or using commerce in this state."[4] In 1779 the tax was raised to two and a half per cent.[5] But in the next year the whole system was abolished.

[1] Laws of the Government of New-castle, Kent and Sussex upon Delaware (Philadelphia, 1752), 234.

[2] American State Papers, Finance, I, 429.

[3] Sketch of Tax Legislation in Maryland. Printed as an appendix to the Report of the Maryland Tax Commission, 1888, cxxix.

[4] Maryland, Laws of 1777, ch. 22, secs. 5, 6.

[5] Laws of 1779, ch. 35, sec. 48.

In South Carolina the faculty tax began earlier. We find that in 1701 a law was enacted which imposed a tax on the citizens according to their "estates, stocks and abilities, or the profits that any of them do make off or from any public office or employment." And two years later it was provided that individuals should be assessed on their "estates, goods, merchandizes, stocks, abilities, offices and places of profits of whatever kind or nature soever." This system continued throughout the century. The law of 1777, which was the first under the state constitution, phrased it a little differently by providing for a tax on "the profits of all faculties and professions, the clergy excepted, factorage, employments, handicrafts and trades throughout this state."[1] And Wolcott, in his report of 1796, describes the system as "founded on conjectural estimates, according to the best judgment of the collectors." These estimates were "understood to be very moderate." In Charleston, for instance, they were graduated according to the circumstances of individuals, from $100 to $5000.[2]

Finally, it may be said that in Virginia an attempt was made in 1786 to introduce the faculty tax, by assessing attorneys, merchants, physicians, surgeons and apothecaries. But the experiment lasted only four years. In 1790 the whole system was abolished.[3]

In addition to these cases of the taxation of profits as such, there were many cases in which, while the tax was imposed on property, the assessment was made on the basis of product. That is, it was deemed easier to ascertain the profits than the value of the property: the property was gauged by the revenue. Thus in Massachusetts in 1692 all estates real and personal were to be rated "at a quarter part of one year's value or income thereof." To make this clearer, it was provided in the following year that "all houses, warehouses, tanyards, orchards, pastures, meadows and lands, mills, cranes and wharffs be estimated at seven years' income as they are or may be let for;

[1] Cooper, Statutes at Large of South Carolina, II, 36, 183; IV, 366.
[2] American State Papers, Finance, I, 435.
[3] Hening's Statutes, XII, 283; XIII, 114.

which seven years' income is to be esteemed and reputed the value of craftman, for his income." From this time on until the Revolutionary period the valuation of real estate was computed on the income derived from it, but the number of years varied. From 1698 to 1700 the valuation was one year's income, but during most of the eighteenth century it was six years' income.[1]

In Rhode Island the ratemakers were to "take a narrow inspection of the lands and meadows and so to judge of the yearly profit at their wisdom and discretion."[2] In New Hampshire the assessors were directed to take the estimated produce of the land as a basis; while houses, mills, wharves and ferries were valued at one-tenth or one-twelfth of their yearly net income, after deducting repairs.[3] In New York it was customary to assess land according to its annual yield, even when other property was valued at a fixed sum. We find this as early as 1693, and frequently thereafter.[4] Even as late as the middle of the eighteenth century the New York assessors for the general property tax took an oath to estimate the property by the product—a pound for every shilling.[5] In Delaware, even after 1796, real estate was still valued according to the rents arising therefrom.[6] Finally, in Virginia, although land was generally estimated at the presumed capital value, the yearly rent or income was sometimes utilized, especially in the towns, as a basis for estimating the value.[7] Toward the close of the century we are told that the usual tax on city property was "five-sixths of one per cent of the ascertained or estimated yearly rent or income."[8]

[1] Acts and Resolves of the Province of Massachusetts Bay, I, 29, 92, 413.

[2] Colonial Records of Rhode Island, III, 300.

[3] Acts of Jan. 2, 1772, and Feb. 22, 1794. Laws of the State of New Hampshire, passed at the General Court, 1793, 471.

[4] Journal of N. Y., March 9, 1693. *Cf.* Act of September 29, 1709.

[5] Oath of assessors, Law of 1743, sec. 13; in Van Schaack's Laws of New York from 1691 to 1773.

[6] American State Papers, Finance, I, 429.

[7] Act of 1793. Shepherd's Statutes at Large of Virginia, 1792--1806, I, 224.

[8] American State Papers, Finance, I, 431.

III. *The Nineteenth Century.*

During the early decades of the nineteenth century not only did the faculty tax gradually fall into disuse, but with the increasing mobility of landed property, assessment according to selling value, instead of annual value or product, became universal. Let us trace further the history of the faculty tax.

In Vermont the old custom continued for several decades. In the consolidated act of 1825 certain classes liable to the faculty tax were to be assessed according to their gains, but with both a minimum and a maximum limit. For instance, attorneys, physicians and surgeons were listed at not less than $10, nor more than $300, "according to their respective gains." Merchants and traders were taxed at figures varying from $15 to $600, "in proportion to their several gains, taking into consideration the capital employed in said business." Mechanics and manufacturers were assessed up to $100, "according to the best discretion and judgment of the listers." This survival of the old custom, however, worked very badly and produced much dissatisfaction. The act of 1841 dropped all reference to the faculty tax, and although by an act of the following year the tax was revived as to attorneys, physicians and surgeons, it was finally abolished in 1850 amid general jubilation.[1]

In Connecticut the old custom continued, nominally at least, until the adoption of the new constitution in 1819. The revenue commission of 1887 described the old system as follows:[2]

> Connecticut from her earliest history had followed the plan of taxing incomes rather than property. Those pursuing any trade or profession were assessed on an estimate of their annual gains. Real estate was rated not according to its value, but in proportion to the annual income which, on the average, it was deemed likely to produce. Land . . . was put in the list at a fixed rate for each kind . . . not because these sums were deemed to be the value of the

[1] Laws of Vermont, 1825, chap. ix; 1841, chap. xvi; 1842, chap. i; 1850, chap. xxxix, p. 28.

[2] Report of the Special Commission of Connecticut on Taxation, 1887, 9–10.

land, but because they were thought to represent the average income they would produce.

This "ancient system of income taxes," as it was called by the commission, came to an end in 1819, and was replaced by the plan of taxing property according to the modern methods.[1]

In Rhode Island and New Hampshire, as we know, the old custom did not survive the eighteenth century. Massachusetts enjoys the distinction of being the only state in the Union in which the faculty tax has continued down to the present day. In preceding pages we traced its history to the law of 1777, which, as we saw, was virtually continued by the new constitution of 1780, and we saw the gradual process by which the term "faculty tax" was displaced both in popular usage and in legal parlance by "income tax." No change was made in the wording of the provisions until 1821, when an act was passed which included among the sums to be returned to the assessor

the amount of the income of such inhabitants from any profession, handicraft, trade or employment, or gained by trading at sea or on land, and also all other property of the several kinds returned in the last valuation, or liable to taxation by any law.[2]

This wording is repeated in the act of 1830,[3] but in this act the term faculty is omitted; and it never reappears in later legislation. In the revised statutes of 1836 another change was made through the omission of the word "handicraft." The section reads as follows:

Personal property shall, for the purpose of taxation, be construed to include . . . . income from any profession, trade or employment, or from an annuity, unless the capital of such annuity shall be taxed in this state.[4]

The next change came in the law of 1849,[5] providing that

[1] Connecticut Session Laws of 1819, 338.

[2] General Laws of Massachusetts from the adoption of the Constitution to 1831 (3 vols.), vol. ii, laws of 1821, chap. 107, sec. 2.

[3] Session Laws of 1830, chap. 86.

[4] Revised Statutes, chap. 7, sec. 4.

[5] Laws of 1849, chap. 149.

income from any profession, trade or employment, shall not be construed to be personal estate for the purpose of taxation, except such portion of said income as shall exceed the sum of six hundred dollars per annum; provided, however, that no income shall be taxed which is derived from any property or estate which is the subject of taxation.

In 1866 the exemption was increased to one thousand dollars, and in 1873, as a result of a compromise with those who were attempting to have the law entirely repealed, to two thousand dollars.[1] This is still the law to-day.

In fixing the meaning of the law of 1849 it has been held by the court that the clause exempting incomes derived from property already taxed does not apply to the profits of merchants and others who employ such property in their business.[2] But the custom has arisen in Boston of exempting six per cent of the income as representing interest on capital, and of levying the tax only on the surplus profits. As a matter of fact incomes are taxed in only a very few places in the state, and on only a very few inhabitants of these places. An official commission tells us that "in a great majority of places the assessors make no mention whatever of income in their valuation lists," while "in others the tax is assessed only upon incomes derived from salaries and the learned professions."[3] In one town of 14,000 inhabitants only thirteen persons were taxed on their incomes in 1874. The injustice of such a method is apparent when it is remembered that personal property itself is reached to only a very small extent. So that practically the burden falls chiefly on the salaried and professional classes. But the tax is so much of a farce that even this burden is very light. It is impossible to say anything definite about the proceeds, as the returns are included in those of the general property tax.

The only other state in which the faculty tax lasted until late in this century was South Carolina. In Delaware and Maryland, as we have seen, the tax disappeared before the close

[1] Laws of 1866, chap. 48; Laws of 1873, chap. 354.

[2] Wilcox *vs.* Middlesex, 103 Mass., 544; *cf.* Collector *vs.* Day, 11 Wall, 113.

[3] Report of the [Mass.] Commissioners [on] Taxation and Exemption therefrom, 1875, p. 50.

of the last century. But in South Carolina we find the tax on "factorage, employments, faculties and professions" mentioned in each annual tax law until 1865.[1] In 1866 a far more comprehensive tax was imposed, in which incomes from "employments, faculties and professions" were included.[2] The context shows, however, that only the strictly professional classes could have been referred to by these words. But with the adoption of the new constitution in 1868, what is essentially the present method of taxation was introduced.

The faculty tax was also employed in local taxation in South Carolina for a considerable period. In 1809 an ordinance of the city of Charleston declared subject to taxation "all profit or increase arising from the pursuit of any faculty or profession, occupation, trade or employment." Clergymen, judges and schoolmasters or other teachers were exempt. The rate was one-third of one per cent.[3] In 1844 the same words were used in a Charleston ordinance, except that "gross profit or gross income" took the place of "all profit or increase,"[4] and mechanics also were made exempt.

Except in the two states of Massachusetts and South Carolina, thus, the old custom of assessing profits as an adjunct to the property tax had totally disappeared by the middle of the century. Moreover, the assessment of real estate according to profits had almost everywhere been supplanted by assessment on selling value. The only exception was Delaware. In that state yet to-day, it is provided that when houses or lots yield an annual rent, the owner shall be assessed for every $12 of rent as for $100 capital. In the case of ground rents, $8 of rent is to be assessed for $100 capital.[5] In all other respects, however, lands are assessed as elsewhere on their selling value.

[1] Statutes at Large of South Carolina, XIII, 237.

[2] *Ibid.*, XIII, 367.

[3] This ordinance is quoted in City Council *vs.* Lee, 3 Brevard, 226, decided in 1812, which held that public salaries were not included.

[4] Quoted in State *vs.* Elfe, 3 Strobhart, 318.

[5] Revised Statutes of Delaware, 1893, chap. 10, secs. 5 and 3, pp. 107–8.

IV. *Income Taxes Proper.*

Up to this point we have discussed the partial taxation of profits as a survival of the colonial faculty tax. But shortly before the middle of the present century a movement began in several of the states to secure greater equality in taxation. This movement, which originally bore some resemblance to the earlier attempts in the colonies, soon grew into something different. We reached, in short, the era of true income taxes. As their history has never been related, it may be profitable to consider the laws somewhat in detail. The three states to which attention is directed are Virginia, North Carolina and Alabama.

In Virginia the taxation of incomes dates back to 1843. In that year a law was enacted imposing what were technically known as a "tax on incomes," a "tax on fees" and a "tax on interest." The tax on incomes was a tax of one per cent on all incomes over $400 "in consideration of the discharge of any office or employment in the service of the state, or of any corporation, company, firm or person." The income of ministers of the gospel and incomes from labor in mechanic arts, trades, handicrafts or manufactures were exempt. The "tax on fees," at the same rate, was imposed on attorneys, physicians, dentists, and "all other persons in respect to their fees above $400, derived from any office, calling or profession." The "tax on interest" was at the rate of 2½ per cent on all "interest or profit, whether arising from money loaned, or from bonds, notes or other securities for money or from bonds or certificates of debt of states or public corporations."[1] In other words, this was a tax on salaries and professional income, and a partial tax on funded income, with separate rates for temporary and for permanent income. In 1846 the "tax on interest" was reduced and made applicable only to profits over six hundred dollars.[2] In 1853 that part of the tax which applied to income from public securities was raised to 3⅓ per cent. But by this law the tax on "incomes" and "fees" was graduated. Incomes below $200 were exempt. On incomes from $200 to $250 the rate was one-

[1] Law of March 27, 1843; Acts 1842–43, 6–8.

[2] Law of Feb. 28, 1846; Acts 1845–46, 7.

quarter of one per cent; and it rose by regular increments to one per cent on incomes of over $1000.[1] After minor changes in 1856 and 1859 the tax was in 1863 practically converted into a general income tax, and it then received that appellation. Under the rubric "incomes and fees," all incomes from offices or employments, ministers of the gospel only being exempt, were taxed $2\frac{1}{2}$ per cent on the excess over $500. Incomes from interest on public bonds were taxed 17 per cent. A new schedule, the "tax on profits," was established, under which a tax of 10 per cent was imposed on the net income in excess of $3000 from all profits from the use of money from another, and profits from any trade, business or occupation. After an elaborate rearrangement of schedules and rates in 1866,[2] an act of 1870 abolished all schedules and imposed a general tax of $2\frac{1}{2}$ per cent on all incomes over $1500. Incomes were defined as "all gains or profits from any source;" and deductions were granted for losses by fire or shipwreck, losses incurred in trade, sums paid for fertilizers, labor or service, except the outlay for improvements, new buildings and betterments.[3] After several reductions in the rate the present form of the tax was adopted in 1884. All incomes, except state salaries, are taxed one per cent. The limit of exemption is fixed at $600, and deductions are permitted for losses incurred in trade, for taxes, rent and the expenses of cultivating land.[4]

Virginia is the only commonwealth in which the income tax figures as a separate source of state revenue. But the proceeds of the tax are insignificant, amounting in 1891–92 to $54,154 out of a total revenue from direct taxes of almost two millions. About four-fifths of the tax was levied in seven or eight cities, almost one-half in Richmond alone.

In North Carolina the income tax dates from 1849. In that year a law was passed with the following preamble:

Whereas there are many wealthy citizens of this state who derive very considerable revenues from moneys which produce interest,

[1] Law of April 7, 1853; Acts 1852–53, chap. 8.
[2] Laws of February 28, 1866, and April 20, 1867.
[3] Law of June 29, 1870, sec. 16; July 9, 1870, sec. 7.
[4] Acts of 1883–84, chap. 450, Sched. D, secs. 10–11, 565.

dividends and profits, and who do not contribute a due proportion to the public exigencies of the same, be it resolved, *etc.*

The dissatisfaction here manifested led to a three per cent tax on all moneys at interest, on all profits from moneys invested in shares or trade, and on the salaries, practice and fees of physicians, lawyers and all others in excess of $500.[1] The tax was popularly known as the "tax on salaries and fees," but in reality it formed an income tax on all commercial and precarious incomes. After some minor changes in 1851 and 1859 the tax was gradually transformed, until it became a tax on income from property not already taxed. This was due in part to the constitutional prohibition against levying an income tax on income from taxed property.[2] The law of 1874 permitted deductions not only for the amount derived from property taxed, but also for that derived from any trade, purchase or profession "taxed by the law of this state."[3] This form of the tax is best seen in the law of 1879, which imposed a tax of one per cent on "the net incomes and profits, other than that derived from property taxed, from any source whatever." Net income was defined as the gross income after deducting taxes, rent, interest on incumbrances, repairs of buildings, ordinary expenses of the business from which the income was derived, and the necessary expenses of the family; but the total deductions could not exceed $1000.[4] The income tax was declared to include interest on national, commonwealth and foreign state securities. A number of minor modifications were made from time to time,[5] and finally, in 1893, the principles of both progression and differentiation were introduced. In the case of gross profits and incomes derived from property not taxed the rate is now five per cent; on incomes from salaries and fees, one-half of one per cent on the excess over $1000;[6] on all other incomes (except from property already taxed) the rate is graduated from

[1] North Carolina, Acts of 1848–49, chap. 77, 129. Law of January 29, 1849.
[2] Const. of 1868, art. v, sec. 3; Const. of 1876, art. v, sec. 3.
[3] Acts of 1873–74, chap. 133, sec. 9, par. 8.
[4] Revenue Act, 1879, class ii, sec. 1.
[5] Revenue Acts, 1881, class ii, sec. 1; 1885, sec. 7; 1889, Schedule A, sec. 5.
[6] Revenue Act, 1893, Schedule A, sec. 5.

one-fourth of one per cent on those between $1000 and $5000, to two per cent on those over $20,000.[1] Although the taxpayers are required by law to return their net incomes, with the sources from which they are derived, the tax is to a large extent a farce. The law is almost a dead letter.

Alabama also at one time had an income tax. It began, as in the other Southern states, as a tax on salaries and professional income. In 1849 the salaries and incomes of all public officers or officers of corporations were taxed one-half of one per cent; while lawyers, doctors and dentists who had practiced three years were required to pay either a specific tax of stated amount or one-half of one per cent on their incomes.[2] After the Civil War this tax was widened into a general income tax. The law of 1867 provided for a tax of one per cent "upon all annual gains, profits or incomes of every person residing in the state, from whatever sources derived, and upon salaries and fees of public officers, and upon salaries of all other persons." An exemption of $500 was made in all cases. Deductions were allowed for taxes, rent or rental value of homestead occupied, income from dividends of corporations, expenses of business, and repairs.[3] The law was supplemented by the acts of 1875 and 1876, which provided in general for the taxation of all salaries, gains, incomes and profits.[4] The tax was nominally levied on both property and income; but the proceeds were so insignificant that it was abolished altogether in 1884.

V. *Conclusions.*

After this tedious review of the facts, let us attempt to ascertain exactly what they mean.

At the very outset the distinction between real and personal taxes must be borne in mind. A real tax is a tax on things; a personal tax is a tax on persons. A land tax, for instance,

[1] Revenue Act, 1895, Schedule A, sec. 5.

[2] Alabama Laws of 1849, no. 1. *Cf.* Code of 1852, par. 391, secs. 25, 26, 31.

[3] Law of February 19, 1867, sec. 3. *Cf.* Rev. Code (1867), par. 435.

[4] Law of March 19, 1875, sec. 11; March 6, 1876, sec. 4.

whether it be levied on property or on produce, is a tax on the land — on the thing itself, a real tax. No attention is paid to the personal condition of the landowner; the government looks to the land itself, as in the case of a tax on houses or a tax on tangible personalty. The objective point is the thing rather than the person. Of course it is always the person, the individual, who is under obligation to pay taxes to the state. But the endeavor to assess the individual as such has always met with great difficulty, and many governments have therefore had recourse to the various pieces of property rather than to the person. The steps in this development are interesting.

In the beginning, when the conception of taxable capacity first forced itself through, as in the early mediæval towns, we find the general property tax. In all early communities, and especially under the feudal system, land is very rarely sold. We accordingly find the earliest land taxes to be taxes on gross produce. The ability of the farmer is measured by the produce of the land, the ability of the land-owner by the rental from the land. Thus the land taxes in early mediæval Europe were taxes on produce or rents. In the more democratic communities, like those of Switzerland, the land tax soon became a tax on the selling value. In the other European countries this transformation was effected a little later, but it was quite general; and everywhere the tax was a tax on the actual value. Only in relatively recent times has it been deemed possible in most of the European states to get more closely at the taxable capacity of the land by a careful estimate of its actual yield. On the greater part of the continent of Europe to-day the land taxes are again assessed on the basis of the yield, but now on net yield, and detailed surveys and valuations are made in order to determine this precisely.

In America the development was very much the same. At the outset, when land was not bought and sold readily, the tax was assessed more or less arbitrarily, either according to the quality of the land or according to its assumed produce. In only a few cases was the still more primitive method pursued of taxing land simply by quantity. But all

these taxes were real taxes; they were taxes on the thing itself, on the land, not on the income of the landowner. When in the course of time transfers of land began to be more frequent, these produce taxes turned into taxes on the actual or selling value, as is the case everywhere to-day throughout the United States. This plan, with the democratic methods of assessment, is supposed to furnish a sufficiently close approach to the truth. We make no attempt, as a rule, to ascertain the exact produce of each parcel of land as a basis for the tax. But whether we assess land upon its produce or upon its value, is immaterial; the tax is on the thing itself.

In addition to this land tax, we find in all partly developed communities a tax upon personalty also. In so far as most of the personalty is visible and tangible, the natural basis of assessment is its actual or selling value. This basis was used in all the mediæval taxes as well as in the American colonies. But it was very soon recognized that property alone, whether in land or in personalty, was not an adequate measure of taxable capacity. Revenue is derived from other sources than from property. Hence it was that an attempt was made to supplement the property tax by a faculty tax upon persons that derived revenue from these other sources. The tax on earnings was supposed to correspond to the property or produce tax on special pieces of personalty or realty. It was not an income tax in the modern sense. By an income tax we mean a tax upon the personal income of the individual. It is a personal tax, not a tax on things, not a real tax. Allowance is made for indebtedness and for other elements affecting the personal situation of the taxpayer. But this faculty tax, as it was called in mediæval Europe as well as in colonial America, was not levied on the total income of the individual. It was a tax not on actual profits, but on assumed profits. Just as articles of personal property were put down on the lists at fixed rates; just as plots of land were set down at sums supposed to represent their capitalized annual produce: so the individuals subject to the faculty tax were not required to make returns of their earnings, but were assessed by the listers at fixed amounts.

As we have seen more specifically in the cases of Connecticut and South Carolina — and the same was true in the other colonies — the faculty tax was nothing but a classified product tax, in which different employments and different classes within each employment were rated at fixed amounts. It was precisely for this reason that the faculty tax, which at the outset gave satisfaction, soon became antiquated and unjust. Instead of being a tax on actual profits or gains as a part of a general tax on incomes, in which attention might be paid to the individual situation of the taxpayer, it was nothing but an arbitrarily-levied class-tax on certain assumed earnings. It bore very little relation to the actual income; it became grievous and unequal; and it was therefore allowed to fall into disuse. It never was an income tax in the modern sense.

On the other hand, the state income taxes of this century, with the exception of that of Massachusetts, which is simply a survival of the old faculty tax, have been true income taxes. They have not been confined to the assumed gross profits of certain particular classes, but have been levied on the actual total income of the taxpayer. The difference between the colonial taxes on profits and the state income taxes is very much like that between the European taxes on product and the income taxes. In Germany, in France and in many other countries, after the general property tax had been abandoned, and after it had been recognized that net product was in some respects a better index of taxable capacity than property, the whole tax system was changed into one on product: that is, first we had the land tax, which was levied on net produce; then came the buildings tax, levied on the rental value of buildings; then came the tax on capital, according to the yield of capital; then came the tax on business, in which the assumed profits were calculated according to the outward signs. All these were taxes on things — on the land, on the house, on the business, on the capital; and finally, to round out the system, there was sometimes imposed a tax on the remaining source of profit, that is, the professions and employments which yield a produce in the shape of a salary or compensation. These taxes are still

to-day known as real taxes (*impôts réels*), or produce taxes (*Ertrags-Steuern*). It is only within a comparatively recent period that product has come to be recognized as a less satisfactory theoretical basis of taxation than income. Product looks at the thing that produces; income looks at the person that receives. In the first case, no allowance is made for debts or other qualifying circumstances; in the second, such allowance is possible. As a consequence, modern income taxes have been imposed partly in the place of, and partly in addition to, these produce taxes. The system of real taxes is being supplanted by that of personal taxes. Or, if we will use the term income, the first class of taxes may be called indirect income taxes, because the income of the individual is only indirectly reached; while the new and more general taxes are direct income taxes, and have the characteristics of a personal, not a real tax.

This is not the place to enter upon the discussion as to what was meant by the term direct tax in the Constitution of the United States, and whether it included this faculty tax — the only form of profits taxation then known in America. If there is any value in the above exposition, however, it is plain that the profits taxes of the American colonies were not direct income taxes, and that in so far as they are called income taxes at all, they must be classed as indirect income taxes. It is very remarkable that in all the legal briefs and arguments presented to the supreme court in connection with the recent income-tax cases no reference was made to the statement of Oliver Wolcott, the secretary of the treasury who in 1796 drew up the celebrated report on direct taxes in the states. Wolcott was thoroughly familiar with all the details of the laws, and in his enumeration of the various taxes imposed he described the faculty tax in the following words:

> 4th. *Taxes on the profits resulting from certain employments.* This head will comprise a variety of taxes collected in certain of the states upon lawyers, physicians and other professions, upon merchants, traders and mechanics, and upon mills, furnaces and other manufactories. In some states these taxes are attempted to be proportioned

to the gains and profits of individuals, in which cases they are both arbitrary and unequal; in other states the taxes are uniform, in which cases they are only unequal.

It is presumed that taxes of this nature cannot be considered as of that description which the constitution requires to be apportioned among the states. . . . It is impossible to render them exactly equal; that they are easy of collection, that their operation is indirect, and that they are capable of being rendered perfectly certain, are recommendations in their favor.[1]

Oliver Wolcott clearly saw, as he expressed it, that the operation of these taxes was indirect, and, with a full knowledge of everything that had been said on the subject in every state, he came to the conclusion that they were not direct taxes in the contemplation of the Constitution. The points which I desire to emphasize here are that these faculty taxes were not direct income taxes at all; that they were simply an addendum to the early land taxes, originally levied on product; and that with the change of the taxes on product into taxes on property these faculty taxes gradually fell into disuse. To call them income taxes is a misnomer. Income taxes in the modern sense were levied for the first time in England in 1799, and it was at a considerably later period that they spread to other countries. To claim, then, that our colonial taxes on faculty were income taxes, betrays a confusion of thought and an ignorance of economic distinctions. The faculty tax had its origin in the same motives that have led to the introduction of modern income taxes, but it was not an income tax; just as the French land tax and the German *Lohnsteuer* of to-day, levied on the produce of land and of industry respectively, are not income taxes.

The distinction between real taxes, or taxes on product, on the one hand, and personal taxes, or taxes on income, on the other hand, is one of fundamental importance in the science of finance. To disregard it can only produce confusion. To observe it will enable us to explain what is otherwise inexplicable in American economic history.

EDWIN R. A. SELIGMAN.

[1] American State Papers, Finance, I, 439.